No. 12715

In the United States Circuit Court of Appeals for the Ninth Circuit

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LILBURN H. BARBEAU, Appellant

vs.

UNITED STATES OF AMERICA, Appellee

ON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION

BRIEF FOR THE APPELLEE

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JURISDICTIONAL STATEMENT

The statement of jurisdiction is properly set forth in appellant's opening brief (P. 1-2).

STATEMENT OF THE CASE

The statement of the case as set forth in the Brief of Appellant is substantially correct with the following exceptions:

The appellant, Lilburn H. Barbeau, knew that the deceased was sitting in a chair in front of him when he was loading his gun (R. Vol. V, P. 456).

There is evidence from the expert witness, Peter J. Kalamarides, who also testified at the preliminary hearing before the United States Commissioner, that the appellant Barbeau gave a different version at the preliminary hear-

ing of the manner in which the gun went off that killed the deceased, than testified to at the trial of this case; and that in the expert's opinion, according to the appellant's version of the incident, it would have been impossible for the gun to have fired (R. Vol. V, P. 482-485).

Obviously, there must have been a pointing of the weapon, intentionally or otherwise, at the deceased since it is admitted by the appellant that the shot from his gun killed the deceased; and, furthermore, the appellant admits he knew the deceased was sitting in a chair just a few feet from him when he started loading his gun (R. Vol. V, P. 456).

It is believed that an additional statement of fact should be briefly set out in view of the appellant's statement of points relied upon as set out in appellant's opening brief (P. 5-6).

The appellant gave a statement to members of the Anchorage, Alaska, Police Department on February 10, 1950, just eight days prior to the death of the deceased, in which he admitted certain repairs to the transmission in a 1948 Cadillac (R. Vol. II, P. 162-163). The appellant also was aware that he and the deceased were suspected of having had a stolen transmission placed in their 1948 Cadillac, as indicated in the testimony of Sergeant Roy Hendricks (R. Vol. II, P. 155-163), and the witness Moody (R. Vol. II, P. 178-182). An examination of

the transmission in the subject Cadillac car by Sergeant Roy Hendricks, of the Anchorage Police Department, was made prior to the February 10, 1950, interview of the appellant. The transmission was examined by him and others on several occasions subsequent thereto. It was ascertained that the transmission in the appellant and deceased's car was not the transmission that had originally been in the car. This was determined by comparison of paints on the motor and transmission, and the fact that the original transmission from the appellant and deceased's car was in the possession of the Anchorage Police Department (R. Vol. II, P. 164-177).

Testimony of employees and mechanics of two local garages pertaining to the circumstances surrounding the removal of the original transmission from the appellant and deceased's car, and the installation of the stolen transmission, are set forth in (R. Vol. III, P. 187 to 260-39) and involves too much detail to be recited in this statement.

Circumstances and testimony pertaining to the transmission would indicate that the appellant and the deceased were not on the best of terms. There was sufficient evidence, if believed by the jury, to have convicted the appellant of Second Degree Murder. There was also sufficient evidence to sustain a conviction of appellant of the crime of Manslaughter by Culpable Negligence.

ARGUMENT

FIRST POINT: 1. THERE WAS NO ERROR IN THE INDICTMENT, SINCE INDICTMENT DOES STATE FACTS SUFFICIENT TO CONSTITUTE THE OFFENSE OF MANSLAUGHTER BY CULPABLE NEGLIGENCE.

SECOND POINT: 2. THERE WAS NO ERROR ON THE PART OF THE COURT IN SUBMITTING TO THE JURY QUESTION OF THE GUILT OF APPELLANT OF THE CRIME OF MANSLAUGHTER BY CULPABLE NEGLIGENCE AS MANSLAUGHTER BY CULPABLE NEGLIGENCE IS A LESSER INCLUDED OFFENSE OF THE CRIME OF MURDER IN THE FIRST DEGREE; THEREFORE, THE COURT DID HAVE JURISDICTION TO PRONOUNCE THE JUDGMENT.

Since the above two points were discussed together by the appellant in his brief (P. 7-23), they will be discussed together in appellee's brief.

It is submitted that there is no merit to the above contention raised by the appellant.

The pertinent provision of the Compiled Laws of Alaska Annotated, 1949, under which this indictment was drawn, reads as follows:

SECTION 65-4-1, First Degree Murder.

That whoever, being of sound memory

and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.

The following Section 65-4-2, entitled, "Obstructing or Injuring Railroad: Verdict." Has no application to this case and is referred to here merely to explain the following Section.

Second Degree Murder is defined by Alaska Compiled Laws Annotated, 1949, as follows:

SECTION 65-4-3-Second Degree Murder.

That whoever purposely and maliciously, except as provided in the last two sections, kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than fifteen years.

Definitions of manslaughter are contained in **Alaska Compiled Laws Annotated, 1949, in Sections 65-4-4 through 65-4-8,** and are set out in appellant's brief (P. 7-8).

Excusable homicide is defined in **Alaska Compiled Laws Annotated, 1949, Section 65-4-11,** and is set out in appellant's brief (P. 9).

The appellant, in his brief (P. 7), concedes that all of the requirements of **Rule 7 (c), and Rule 31 (c) of the Federal Rules of Criminal**

Procedure are met in the charging portion of the indictment as to the offense of the murder in the first degree, murder in second degree, and manslaughter (R. Vol. I, P. 3), which reads as follows:

> That on or about the 18th day of February, 1950, at Anchorage, Third Judicial Division, District of Alaska, Lilburn H. Barbeau purposely and of deliberate and premeditated malice killed Paul Gunn by shooting the said Paul Gunn with a pistol.

The appellant cites the following Sections of **Alaska Compiled Laws Annotated, 1949:**

> Section 65-4-5, Procuring another to commit self-murder.
> Section 65-4-6, Abortion.
> Section 65-4-7, Physician administering poison, etc.
> Section 65-4-8, Negligent homicide,

and states that they are not included in offenses charged in the indictment for murder in the first degree.

We are not here concerned with any of the referenced sections except the last, and that only to the extent as to whether there should have been an allegation that the killing was the result of culpable negligence on the part of the appellant. It is believed that the authority cited by the appellant in his brief (P. 10-12) states the general law on the subject, but it is submit-

ted that they are not authority for the proposition advanced by the appellant; namely, that negligent homicide is not a lesser included offense under an indictment for the crime of first degree murder under the statutes of Alaska.

The contention that the failure to allege culpable negligence in the indictment omits an essential element of the crime of which appellant was convicted is answered by the trial judge in his opinion (R. Vol. I, P. 52-56).

The trial judge's opinion is amply supported by authorities in other jurisdictions.

In **State v. Stanford,** 15 S. 2d. P 817, Supreme Court of Louisiana, the appellant was indicted and tried for the crime of manslaughter; and the jury, under proper instruction from the Court, returned a verdict of guilty of negligent homicide. A negligent homicide statute was in effect in Louisiana. The appellant there argued that the offense of negligent homicide does not include all the elements of the crime of manslaughter because the former was committed without the intent to take the life of another; whereas, in the latter there must be intent to cause death or great bodily harm, etc. * * *

The Court in its opinion states:

> murder, manslaughter and negligent homicide are each classified as homicides but are of different magnitudes or grades. All of them are identical in that the offense con-

sists of the killing a human being by another. The only difference between them is the degree of intent, as will appear from a reading of the above quoted and pertinent articles. So, where a homicide is committed, the grade of the offense depends upon the intent of the defendant in committing the act which directly or indirectly caused or resulted in the victim's death.

It will be noted that Article 5 of the Louisiana Criminal Code is a general one dealing with the subject where greater offenses include lesser ones and it recognizes the right of the State to prosecute for and convict of either the greater crime or one of the lesser offenses included in the greater. Article 386 of the Code of Criminal Procedure, as amended, specifically deals with indictments which set out offenses including other crimes of less magnitude or grade and it is expressly stated therein that "in all trials for murder the jury shall be instructed that they may find the accused guilty of manslaughter or negligent homicide." This language and the fact that murder, manslaughter and negilgent homicide are treated together in Chapter 1, of Title II of the Louisiana Criminal Code show that the Legislature considered that negligent homicide was an offense of less magnitude or grade than murder or manslaughter and included in the latter two as a lesser offense.

Counsel for the defendant argues that the provisions of Article 386 of the Code of Criminal Procedure, as amended, are not applicable to the instant case because this was

not a trial for murder but manslaughter and as we are dealing with criminal law, there must be a strict construction placed upon the provisions in question against the State and in favor of the accused.

The basis of the contention is that all of the elements of manslaughter are not included in the crime of negligent homicide, and, therefore, the two are not kindred or generic. From a reading of the above quoted Articles of the Criminal Code, it is obvious that there is more difference between the elements of the crime of murder and negligent homicide than there is between manslaughter and negligent homicide. Yet, the Legislature has stated that in all trials for murder it is the mandatory duty of the judge to instruct the jury that they may find the accused guilty of either manslaughter or negligent homicide. Clearly, it was the intention of the members of the Legislature to require the judge, where the accused is charged with manslaughter, to instruct the members of the jury that they might find the accused guilty of negligent homicide. Therefore, a verdict of guilty of the lesser offense is responsive to the charge of manslaughter.

In **State v. Staples,** 148 N.W., 283, The Supreme Court of Minnesota, in discussing the question of the necessity of alleging essential elements necessary to constitute the charge for a lesser included offense in a homicide indictment had this to say:

*****defendent contends that the indictment contained allegations inconsistent with the charge of manslaughter in the second degree. If this be true, it does not help defendant's case. It only signifies that defendant's crime, instead of being treated as manslaughter, might have been treated as the more serious crime of murder. Our statute provides that the same indictment may charge murder, and also the different degrees of manslaughter, * * * * and upon an indictment for murder the jury may find the defendant guilty of manslaughter in any degree * * * * though such offense may not be described in the indictment. If "the act for which the accused is indicted is the same for which he is convicted, the conviction of a lesser degree is proper, although the indictment contains averments constituting the offense of the highest degree of the species of crime"; and this is true, even though it "omits to state the particular intent and circumstances characterizing a lower degree of the same crime." * * * * Defendant cannot be heard to complain that the charge on which he was tried and convicted was not so grave as the facts alleged in the indictment would warrant.

In the case of **Bradshaw v. State** 50 S. W. 359 and **Combs v. State** 108 S.W. 649, the defendants in both cases were indicted for the crime of murder in the first degree. Upon the trial of the cases, the defendants interposed the defense that the killing was purely accidental. The same defense is interposed by the appellant Barbeau

in the case now under consideration. The Court, in disposing of the defendant's contention that the crime of negligent homicide was not a lesser included offense of the crime of murder in the first degree, held that a person indicted for murder may be convicted for negligent homicide.

The Circuit Court of Appeals, 9 Cir., in **Hopper v. United States,** 142 F. 2d. 181, 184, in discussing the sufficiency of the indictment charging the defendant with evading the Selective Service Act, had this to say:

> The Courts are admonished by Section 1025 of the Revised Statutes, **18 U.S.C.A. Section 556,** that "no indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."
>
> At least since **Hagner v. United tates** 285, U. S. 427, the Federal Courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations.
>
> The court further observed, 285 U.S. at page 433, 52 S. Ct. at page 420, 76 L. Ed. 861, that "upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be

found within the terms of the indictment."

The Court in **Hopper v. United States,** 142 F. 2d 181, 185, supra, says:

> As recently as the present year the Court of Appeals of the Fourth Circuit in **Nye v. United States,** 137 F. 2d 73, speaking through Judge Parker, has reviewed the rule of the Hagner case and its own earlier decision of similar import in **Martin v. United States,** 4 Cir., 299 F. 287. Said Judge Parker in the Nye opinion (137 F. 2d at Page 76):
>
> "Following the decision in the Martin case we have consistently followed the rule there laid down, sustaining under a variety of circumstances indictments drawn in general terms where they set forth the ingredients of the offense as defined by statute with sufficient definiteness and certainty to apprise the defendant of the crime charged and to protect him against further prosecution for the same offense." (citing cases)

The Court then quotes from an opinion of Judge Learned Hand in **United States v. Polakoff,** 2 Cir., 112 F. 2d 888, a prosecution involving a charge of conspiracy to obstruct justice:

> The indictment merely alleged that the accused conspired "to influence and impede the official actions of officers in and of the United States District Court * * * in order that said Sidney Kafton would receive a sentence of not more than one year and one

day." The challenge is that it should have specified who were the "officers" that were to be so "impeded." We do not see why, if the accused were really in ignorance of this detail, they could not have been fully protected by a bill of particulars. Decisions such as **Heaton v. United States,** 2 Cir., 280 F. 697, and **Kellerman v. United States** 3 Cir., 295 F. 796, are of doubtful service today, when objections which do not go to the substance of a fair trial no longer get much countenance. **Hagner v. United States,** 285 U.S. 427, 431, **Berger v. United States,** 295 U.S. 78, 84; **Crapo v. United States,** 10 Cir., 100 F. 2d 996, 1000.

The Court in **Hopper v. United States,** 142, F. 2d 181, 185, supra, says:

> This Court, too, more than once announced the principle stated in the foregoing authorities, and has adhered to the command of the quoted statute. **Woolley v. United States,** 9 Cir., 97 F. 2d 258, 261; **Zuziak v. United States,** 9 Cir., 119 F. 2d 140-141. **Cf. Ackerachott v. United States,** 9 Cir., 139 F. 2d 114, * * *
>
> We hold that the indictment is sufficient and that the commission of the offense was amply established.

In **State v. Baublits** 27 S.W. 2d 16, 21, the defendant was indicted for the crime of murder in the second degree. Upon the trial of the case, th defendant interposed a defense of accidental killing. The defendant was convicted under this

indictment for the crime of manslaughter by culpable negligence. The defendant appealed and assigned as error that the crime of manslaughter by culpable negligence was not a lesser included offense under an indictment for murder in the second degree. The court disposed of this argument by stating that it is well settled that a conviction for manslaughter by culpable negligence can be had under an indictment for a higher degree of homicide.

In **People v. Pearne,** 50 Pac. 376, the defendant was indicted and tried for voluntary manslaughter and convicted of involuntary manslaughter. The defendant appealed, assigning as error the fact that the conviction for involuntary manslaughter under an idictment for manslaughter was a fatal variance. Statutes in effect in California applicable to manslaughter define both voluntary and involuntary manslaughter. Manslaughter was defined as follows:

> "Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> (1) Voluntary—upon a sudden quarrel or heat of passion.
>
> (2) Involuntary—in the commission of an unlawful act not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution

> and circumspection." The indictment charged that the defendant "did deliberately, willfully, and unlawfully kill one Ellen Dogen." The evidence indicated that the killing was not done deliberately and willfully, but accidentally and unintentionally.

The defendant insisted on appeal that since the indictment charges the crime of voluntary manslaughter that conviction of involuntary manslaughter constitutes a fatal variance.

The Court in commenting upon this assignment of error had this to say:

> This position is not well taken. If this indictment had simply charged an "unlawful killing," without malice, it would have charged the crime of manslaughter of both kinds, voluntary and involuntary. By the additional words "deliberately and willfully" it certainly should not be held that it charges less than it did before those words were added. An "unlawful killing" is still charged, and such a killing constitutes involuntary manslaughter. It might, with the same reason, be urged that under an indictment charging a killing with malice and premeditation, a conviction for killing without malice and premeditation would not be sustained.

In the case of **Commonwealth v. Matthews,** 12 S.W., Page 333-334, the Court says:

> The general rule is that one who causes

> death by his negligence is responsible, whether he was at the time engaged in legal or illegal business. If the business be in character felonious, then he is guilty of murder. If legal, and homicide results from negligence and the discharge of it, it is manslaughter. This rule is, however, subject to exception; when, for instance, the act, although carless in itself, be done under such circumstances that it could not reasonably be supposed injury would result.

In **Davis v. State,** Court of Appeals of Alabama, 19 S. 2d 356, the defendant was indicted for the crime of murder in the first degree. Upon the trial the jury returned a verdict finding defendant guilty of manslaughter in the first degree. The Court instructed the jury on murder in the first degree and second degree, and manslaughter in first degree, but omitted to define manslaughter in second degree or to instruct the jury to consider that degree of homicide, from this conviction the defendant appealed. In discussing included offenses of an indictment charging murder in first degree, the **Court said:**

> As stated, the indictment charged murder in the first degree, and therefore included within its terms all the lesser degrees of homicide, as well as all other offenses necessarily included in the offense with which the defendant was charged, whether a felony or a misdemeanor.

The jury having by its verdict found the defendant guilty of manslaughter in the first degree, it necessarily follows that the defendant was acquitted of the offense of murder in the first degree, and murder in the second degree, charged in the indictment.

Under **Section 320, Title 14, of the Code 1940,** it is provided that: "Manslaughter, by voluntarily depriving a human being of life, is manslaughter in the first degree; and manslaughter committed under any other circumstances is manslaughter in the second degree."

Involuntary manslaughter has been defined to be: "The unlawful killing of a human being without malice, either expressed or implied, and without intent to kill or inflict injury causing death, committed accidentally in the commission of some unlawful act not felonious, or in the improper or negligent performance of an act lawful in itself." (Italics Ours.)

The evidence showed without dispute that the deceased came to her death as a result of gunshot wound inflicted upon her intentionally or unintentionally by the defendant. It was the contention of the State that the appellant deliberately and intentionally shot his wife.

It was the contention of the appellant that he unintentionally and accidentally shot the deceased while attempting to transfer a loaded shotgun from a front seat to a rear seat of the automobile in which the deceased with

their baby in her arms was about to enter. Under this set of facts the Court stated:

> The jury may have found under the evidence introduced upon the trial that it was careless and negligent for the defendant to be riding along a public highway of Calhoun County with a double barrel hammerless shotgun, both barrels of which were loaded, in his automobile. Under the evidence the jury might have found that it was careless and negligent for defendant to attempt to move the shotgun without first unloading it, and without taking all reasonable precaution to see that it was not pointed in the direction of his wife, who was about to enter the autmobile with their baby in her arms, because some of the testimony tended to show that the gun was loaded with buck shot.
>
> The indictment upon which the defendant was tried included manslaughter in the first degree and manslaughter in the second degree. The defendant's plea of not guilty put in issue every degree of the homicide, charged in the indictment.

The Court charged the jury as to murder in the first degree, murder in the second degree, and manslaughter in the first degree, but refused to charge the jury as to manslaughter in the second degree. The Court in reversing the conviction stated:

> The defendant claimed that the death of his wife was entirely accidental but it was

> for the jury under all the testimony to say whether or not the defendant was negligent in handling the shotgun and whether its discharge was a result of such unintentional but negligent act. Under this aspect of the case the jury **** might well have found the defendant guilty of manslaughter in the second degree.

This case was considered by the Supreme Court of Alabama, **19 S. 2d 358,** and the Apellate Court was sustained. The Supreme Court said:

> But when there is a trial on an indictment for murder in the first degree which includes every degree of criminal homicide, it is error for the court to refuse upon written request to instruct the jury upon the law of manslaughter unless there is an entire absence of evidence tending to show that the killing was under such circumstances as to reduce it to manslaughter.
>
> We agree with the Court of Appeals that there is **not** an entire absence of evidence as recited in their opinion tending to show that the killing was under such circumstances as to reduce it to manslaughter in the second degree.

The indictment in this case certainly meets the requirements set down in the abovecited cases, namely, that in this case the appellant, Lilburn H. Barbeau, was convicted of the crime of unlawfully killing Paul Gunn. Whether or not he was convicted of the crime of

murder in the first degree, or manslaughter by culpable negligence, it is submitted that he knew at the time the indictment was returned that he was being tried for the unlawful killing of Paul Gunn.

If the reasoning in these cases is not sound, then in every murder case where the defendant interposed the defense of accidental killing and the evidence warrants only conviction for manslaughter by culpable negligence, the administration of justice would be unduly hindered if not completely defeated. We submit that the defendant was aware of the charge of which he was being tried, in view of the fact that counsel in their opening statement stated, "The shooting which occurred on the date alleged, was simon--pure accident without the fault of the defendant (R. Vol. II P. 4)." Without reference to the more serious crimes necessarily charged in the indictment, the only reasonable inference that can be drawn from the statement of counsel for the defendant is that the defendant and his counsel were aware that the defendant was criminally liable for the killing of the deceased if the evidence showed the defendant's act of shooting the deceased was committed while he was performing a lawful act in a culpably negligent manner. In its opinion, (R. Vol. I P. 57) the trial Court held that all of the requirements of the 6th amendment of the Federal Constitution, providing that, "The accused shall enjoy the right * * * to be informed of the

nature and cause of the accusation," were met by stating in substance that a bill of particulars should have been requested, if, as the defendant contends, he was not informed of the nature and cause of the accusation. However, the Court held that such contention was without merit and rightfully so, we believe.

In the case of **State v. Stanford,** 15 S. 2d, 817, supra, at page 819, the Court, in passing on the sufficiency of the indictment from a constitutional standpoint where the applicable provisions of the state constitution is identical to applicable provisions of the 6th amendment of the Federal Constitution, stated:

> The above quoted provision of the Constitution guarantees the defendant in a criminal prosecution that he shall be informed of the nature of the charge against him. The defendant knew that he was charged with the crime of manslaughter and that the Legislature had authorized the judge even in murder cases to instruct the jury that they might return a verdict of negligent homicide and, consequently, the defendant knew, since he was charged with manslaughter, that the court was also authorized to instruct the jury that they might return such a verdict. Counsel for the defendant has not referred us to any authority holding that where the jury returned a verdict of a lesser offense included in a greater one that such a verdict would be null and void, in violation of Article I of Section 10 of the Constitution of 1921. The Legislature, in the

above quoted Articles of the Louisiana Criminal Code and the Code of Criminal Procedure, has treated the homicides as murder, manslaughter and negligent homicide as kindred and generic and has informed the accused that if he is charged with either of the two greater offenses, then the judge shall instruct the jury that they may bring in a verdict for the lesser of offense.

From the foregoing it is submitted that the accused was informed of the nature and cause of the accusation against him; that he was not misled by the indictment as to the charge against him; and that he has not been prejudiced by the indictment not setting out in more detail the crime of which he was convicted.

THIRD POINT: 3. THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CONCLUSION OF THE EVIDENCE OF THE PLAINTIFF.

FOURTH POINT. 4. THE COURT DID NOT ERR IN DENYING DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CONCLUSION OF THE EVIDENCE IN THE CASE AND AFTER BOTH PLAINTIFF AND DEFENDANT HAD RESTED.

The appellant's third and fourth assignment of error has been covered by the arguments on the first and second points.

FIFTH POINT. 5. THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE

VERDICT; THE VERDICT WAS NOT AGAINST LAW; AND THE INDICTMENT DOES CHARGE THE OFFENSE OF WHICH DEFENDANT HAS BEEN CONVICTED.

The point that the verdict was not against law has been fully covered by arguments on first and second points.

The testimony of the appellant that he was pointing an automatic pitol at the deceased who was only a few feet away from him while loading the pistol, was certainly sufficient evidence to submit to the jury the question of culpable negligence on the part of the appellant (R. Vol. V, 436, 456, supra).

It is believed that the appellant will admit that Court's instructions in this case adequately and correctly defined the meaning of "culpable negligence" as used in the Alaska Statute. A review of the cases cited in appellant's brief does not indicate, nor do we believe that appellant contends, that the instructions in this case were not proper. Therefore, if the indictment in this case states facts sufficient to constitute the crime of "negligent homicide" by "culpable negligence," and meets the requirements of the 6th Amendment, which we submit it does, then the appellant has no complaint as to the instructions defining culpable negligence (R. Vol. 1, 13-14).

SIXTH POINT: 6. (a) THE COURT DID NOT ERR IN OVERRULING THE MOTION OF THE DEFENDANT, MADE AT THE CONCLUSION OF ALL THE EVIDENCE, TO EXCLUDE FROM THE EXHIBITS TO BE TAKEN BY THE JURY, THOSE EXHIBITS RELATING TO THE QUESTION OF MOTIVE.

6. (b) THE COURT DID NOT ERR IN PERMITTING THE PLAINTIFF'S EXHIBITS 9 AND 10, BEING UNSIGNED PURPORTED STATEMENTS OF THE DEFENDANT, TO BE TAKEN BY THE JURY WHEN THEY RETIRED TO CONSIDER THE CASE.

Point 6 (a). It is true that the trial Court took from the jury the question of murder in the first degree. It submitted that this question was taken from the jury only because the plaintiff had not proved the essential element of "premeditation"; but it is submitted that evidence of motive is competent to show intent, malice, and purpose on the part of the accused to commit the homicide, which are necessary elements of the crime of murder in the second degree.

Underhill's Criminal Evidence, Fourth Edition, Section 559, at Page 1094, has this to say:

> The motive of one charged with and being prosecuted for murder need not be established, although it may be; and where

> circumstantial evidence is relied upon, it is especially proper that motive be shown. Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant as rendering more probable the inference that the defendant did kill him. **The absence of motive does not require that the accused shall be acquitted, though it may be considered in determining the presence of intention.** (emphasis ours)

At page 1099, supra, the writer states that it is relevant to show:

> that the deceased had procured the indictment or arrest of the accused, or was a witness against him, or a friend or relation of his, in some judicial proceeding then pending or soon to be begun.

The text writer, at page 1102, supra, says:

> Evidence tending to show the concealment of a prior crime as a motive for the killing is admisable. Likewise, evidence tending to show the desire to remove an important witness against accused in a criminal case, is admissable.

It is submitted that plaintiff's exhibits 9, 10, 11, 12 and 13 tended to show that the appellant had a motive to kill the deceased, and this motive would and did tend to establish intent, malice, and purpose on the part of the appellant to kill the deceased. The investigation

by the police of the theft of the transmission, the presence of the stolen transmission in the appellant and deceased's car, which was established by the police and made known to the appellant, certainly was relevant testimony tending to establish intent, malice, and purpose.

It is submitted that there was no error on the part of the trial Court in submitting the referenced exhibits to the jury on the second degree murder charge.

Point 6 (b). The Court did not err in permitting the plaintiff's exhibits 9 and 10 to be taken by the jury when they retired to consider the case. In the case of **Armstrong v. United States,** C.C.A. 9th 16 F. 2d P. 62, where the defendant was convicted for possession of property for the manufacture of liquor, etc., the plaintiff assigned as error the fact that the Court admitted in evidence certain articles. It appeared from the record that a witness had testified to the possession of the above-referred property without objection; and thereafter, the referenced property was introduced at the trial. No objection was made to the testimony of the witness or to the introduction in evidence of the property which the witness had testified in regard to. The Court, at page 64, stated:

> This testimony being before the Court without objection as to the finding of the stills, the condition in which they were found, the temperature disclosed, the 395

gallons of liquor which the witness saw, when the record further discloses that "thereafter, certain other witnesses were sworn and testified for the government and for the defendant," even though we should conclude that the stills and the liquor were erroneously received, there is nothing before the Court to show that this act, if error, is in any sense prejudicial to the defendant.

The Court goes on to say that the complaining party must show that he was denied a substantial right in the introduction of evidence before a reversal will be made. In the case of **United States v. McCann,** et al, C.C.A. 2d. 32 F. 2d 540, the defendant appealed from a judgment of conviction for using the mails to defraud. Error was assigned, and it was claimed sufficient to reverse the judgment because the court did not limit the effect of the statement of one of the witnesses which was offered in evidence. The court, in commenting upon this assignment of error at P. 541 stated:

No objection was made by the appellant, nor was request made to limit the exhibit, as applying only to defendant, J. J. McCann. J. J. McCann was acquitted. In the absence of some request restricting the use of this exhibit, no reversible error is established. * * * Since the passage of Section 269 of the United States Judicial Code (28 U.S.C.A. Section 391) the burden is on the appellant to show from the record as a whole that there was denial of a substan-

tial right. * * * cases cited * * The contents of this exhibit was merely cumulative, and there is ample evidence without it to sustain the statement therein contained as against each of the appellants. Nor was it error to admit the letters containing the signatures of fictitious names, for it was established that these names were signed in the offices of the respective concerns, and the letters were mailed in the due course of business from that office.

Is is submitted that the appellant Barbeau has not sown from the records as a whole that there was denial of a substantial right. In fact, it is hard to imagine how a substantial right of the appellant could have been denied since all the documents which the appellant requested be withheld from the jury pertain to motive which was necessary and competent to establish murder in the second degree. Since the defendant was not found guilty of murder in the second degree, it appears that if there was error, it was error without prejudice. It is inconceivable, it appears, to infer that the jury, by any stretch of the imagination, could have used the exhibits in determining the defendant was guilty of the crime of negligent homicide.

SEVENTH POINT: 7. THE COURT DID NOT ERR IN OVERRULING DEDEFENDANT'S MOTION IN ARREST OF JUDGMENT (R. Vol. I, P. 36). (erroneously number 6 in Appellant's brief P. 6)

This point has been covered in the argument on the first and second point in the appellee's brief.

LAST POINT. THE COURT DID NOT ERR IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL OF SECOND DEGREE MURDER MADE AT THE CONCLUSION OF THE TRIAL AND AFTER BOTH SIDES HAD RESTED. (The Appellant's last assignment of error)

Argument on this point is covered in appellee's argument on Point 6 raised by appellant.

CONCLUSION

An examination of the entire record fails to reveal any error on the part of the Court which would warrant reversal. In fact, the instructions on the lesser degree of homicide of which the appellant was convicted was obviously most favorable to him. The appellant was ably represented by two attorneys who, in their opening statement and by requesting instruction on manslaughter by culpable negligence, refute any claim of appellant that he was not aware of the fact that he was also being put on trial, under the indictment for murder, for the crime of negligent homicide. No legitimate reason exists for upsetting the verdict, since it appears the appellant had a fair and impartial trial.

Respectfully submitted,

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